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March 27, 2018

VIA ECF

United States District Court
Southern District of New York
40 Foley Square, Room 705
New York, NY 10007

Re: *Bytemark, Inc. v. Xerox Corp. et al., 1:17-cv-01803-PGG*

Dear Judge Gardephe:

We represent Plaintiff in the above captioned case. We write this letter to advise the Court of a Federal Circuit case that issued on February 8, 2018,[1] that is relevant to the issue of patent eligibility under 35 U.S.C. § 101 with respect to Defendants' pending Motion to Dismiss (Dkt. Nos. 51, 52, and 53) and Plaintiff's Opposition to Defendants' Motion to Dismiss (Dkt. No. 54) and represents a material clarification of the law with respect to both the factual nature of the § 101 eligibility inquiry and the legal evidentiary standard that applies to this inquiry.

Berkheimer v. HP Inc., 881 F.3d 1360, 1368 (2018) provides:

> The question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact. Any fact, such as this one, that is pertinent to the invalidity conclusion must be proven by clear and convincing evidence. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95, 131 S.Ct. 2238, 180 L.Ed.2d 131 (2011).

Respectfully submitted,

/s/ Dariush Keyhani
Dariush Keyhani

cc: Defendants' counsel via ecf

[1] This case was inadvertently left out of Plaintiff's letter dated February 16, 2018.